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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae*, the National Association of Defense Lawyers and the Association of Federal Defenders move for leave to file the accompanying brief *amici curiae* in support of the petition for certiorari.

The petitioners, who are represented by legal counsel, have consented to the filing of this brief *amici curiae*. The respondents, similarly represented by counsel, have not consented to the filing of this brief.

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. The Association of Federal Defenders is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices, all created by the Criminal Justice Act, 18 U.S.C. § 3006A.

Consistent with their goals of advancing the protections of persons against arbitrary treatment at the hands of the criminal justice system, NACDL and AFD offer their legal analysis of an arrest for the petty offense of driving without a license. Both organizations regularly appear before this Court as *amicus curiae*, have an expertise in criminal law, and a commitment to the rights of the accused.

Amici curiae therefore are able to provide a unique perspective to this Court on practical and legal problems with misdemeanor arrests that involve no breach of the peace, the issue raised in the petition for writ of certiorari. *Amici curiae*

therefore respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, NACDL has almost 10,000 members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military personnel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates.

Among NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL urges this Court to review the decision of the United States Court of Appeals for the Fifth Circuit as the lower court decision provides for vast officer discretion, permitting the overzealous officer to arrest any person he chooses for the pettiest of offenses. The Fourth Amendment is designed to constrain the discretion of the officer in the field and assure that his conduct in seizing citizens, when permissible, is reasonable. The Fifth Circuit decision provides neither assurance. Accordingly, NACDL files this brief in support of the petition for writ of certiorari

The Association of Federal Defenders ("AFD") was formed in 1995 to enhance the representation under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

Amendment of the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. We believe that this mission calls upon us to join in asking the Supreme Court to the review the *Atwater* case. Although it is a civil rights action rather than a criminal case, *Atwater* presents an issue of great importance in criminal law: whether the Fourth Amendment prohibits the use of custodial arrests for fine-only traffic offenses. A full custodial arrest invades one's privacy interests and one's dignity, and can often lead to criminal prosecution on other charges. It is in the interest of our clients to ask the Supreme Court to review the Fourth Amendment's requirements in this area.

SUMMARY OF ARGUMENT

This Court has held that even where an officer has probable cause to believe a suspect has committed a crime, the reasonableness of the manner of seizure is governed by the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Reasonableness is first viewed through the lens of the common law. "[A]n examination of the common-law understandings of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." *Payton v. New York*, 445 U.S. 573, 591 (1980). At common law, a misdemeanor arrest was not permitted absent a reason to believe that the suspect would occasion a breach of the peace if not arrested. Sir

James Stephen, *History of the Criminal Law of England* 193 (1883).

The reasonableness of a seizure is further considered by weighing the state's interests in the seizure against the individual's liberty interest. *Garner*, 471 U.S. at 8. The state's interest in detaining a person charged with a crime are ensuring the defendant's presence at trial and preventing further harm at the defendant's hands in the interim. *See United States v. Salerno*, 481 U.S. 739 (1987). A defendant charged with a fine-only misdemeanor offense is unlikely to attempt to evade the justice system given the very minimal potential punishment and the relatively onerous sanctions for failure to appear. Failure to appear is a separate offense and failure to answer a traffic charge can lead to suspension of one's driver's license in her state of origin, irrespective of the location of the offense. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 17 Pace L. Rev. 97, 159 n. 320 (1997) (noting many states have joined the Non-Resident Violator Compact permitting the suspension of a driver's license in her home state for failure to answer a traffic charge in another state).

Finally, this Court's holding in *Knowles v. Iowa*, 525 U.S. 113 (1999) demonstrates this Court's assumption that a misdemeanor that involves no breach of the peace does not justify a custodial arrest. This Court held in *Knowles* that a search incident to arrest could not occur if a motorist is merely given a citation for a traffic offense. *Id.* at 118. Long-standing precedent of this Court permits a search incident to arrest prior to the actual arrest, so long as an officer has probable cause to make the arrest at the time of the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). If probable cause to believe a motorist had committed a traffic offense permitted a custodial arrest, then the search of

Mr. Knowles would have been justified as an arrest *could* have taken place.

Notwithstanding the fairly clear application of this Court's doctrines to the issue of misdemeanor arrests involving no breach of the peace, a variety of results have appeared in the lower courts.

The First Circuit has recognized that the Fourth Amendment requires that the seizure of a person for a misdemeanor offense must be reasonable, that probable cause does not end the inquiry into whether an arrest is reasonable. *Diaz v. City of Fitchburg*, 176 F.3d 560 (1st Cir. 1999). The Ninth Circuit has held that the Fourth Amendment forbids an arrest for a misdemeanor if state law prohibits such an arrest. *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993).

The Court of Appeals decision in the instant case is to the contrary, holding that so long as officers have probable cause to believe a misdemeanor infraction has occurred, an arrest is permissible so long as the suspect is not killed or maim in the seizure. *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 (5th Cir. 1999) (*en banc*).

A patchwork of official discretion is left in the wake of these decisions -- citizens in the Ninth Circuit are subject to misdemeanor arrests unless their state legislatures provide otherwise, citizens in the First Circuit are subjected only to "reasonable" misdemeanor arrests, while citizens in the Fifth Circuit enjoy no federal constitutional protection from such seizures.

This Court should grant certiorari so that this important question of whether citizens may be subjected to such official discretion may be considered.

ARGUMENT

I. THE FEDERAL CONSTITUTION'S LIMITATIONS ON THE POWER TO CONDUCT A MISDEMEANOR ARREST HAVE BEEN DIVERSELY INTERPRETED BY FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT.

Some federal courts of appeal and state courts of last resort have held that the Fourth Amendment imposes no limitations on an officer's discretion to arrest for a misdemeanor. Others have held that an officer may never arrest for a simple misdemeanor. In short, every possible manner of applying the Fourth Amendment to this question appears in the reported decisions. A hodgepodge of officer authority exists -- in Tennessee, a motorist may not be arrested for reckless driving, traveling 92 miles per hour in a 65 mile per hour zone. *See State v. Colzie,* No. M1998 00253 CCA R3 CD, 1999 WL 1074111 (Tenn. Crim. App., November 30, 1999). The same motorist, in Texas, may be arrested, searched, the contents of her car inventoried for failure to wear her seat belt. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (*en banc*).

Fourth Amendment limitations on the power to arrest for a misdemeanor involving no breach of the peace could take one of three forms:

(1) The amendment may prohibit the arrest as such an arrest was impermissible under the common law and involves an intrusion into individual liberty exceeding the state's interest in the custodial arrest. *See State v. Hehman*, 578 P.2d 527 (Wash. 1978) (finding as a matter of state public policy the degree of intrusion exceeds the state's interest in prosecuting an ordinary traffic offense); *Diaz v. Fitchburg*,

176 F.3d 560 (1st Cir. 1999) (recognizing Fourth Amendment may prohibit certain category of misdemeanor arrests, but not where the crime is trespass which under Massachusetts law requires a person to refuse an official request to leave, demonstrating a violation that will not conclude absent an arrest).

(2) Statutory provisions on the power to arrest may define those intrusions which are unreasonable. *See United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993) (state prohibition on custodial arrest for minor infraction renders such an arrest violative of the Fourth Amendment); *State v. Bland*, 884 P.2d 312 (Colo. 1994) (*en banc*) (custodial arrest for misdemeanor marijuana possession not permitted in light of statute providing for citation for offense); *State v. Chearis*, 995 S.W.2d 641 (Tenn. Crim. App. 1999) (arrests for misdemeanors unreasonable given state statute prohibiting arrest except where prosecution would be jeopardized by citation or breach of peace is threatened).

(3) The amendment imposes no limitations on arrests based on probable cause that occur outside the home that do not involve deadly force. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244 (5th Cir. 1999) (*en banc*). This interpretation expands the doctrine of *Whren v. United States*, 517 U.S. 806 (1996) beyond facts ever contemplated by this Court. This interpretation assumes that since a seizure may always occur whenever an officer has probable cause to believe a citizen has committed a crime, that the *manner* and *degree* of his seizure are beyond the scope of the Fourth Amendment.

These widely varying interpretations of the Fourth Amendment leave citizens of varying jurisdictions at the hands of officers with vastly different degrees of discretion. The approach taken by the lower court permits an officer to take a motorist into custody, lead her away in handcuffs, have her booked, leave her with an arrest record, and require her to remain incarcerated until posting bond for an offense so minor that even a judicial officer could not order the sanctions imposed by the officer. The reasonableness of this intrusion, under present law, turns on the location of the arrest.

This Court must grant certiorari lest officer discretion to perform intrusions turn on geography and jurisdiction. This Court has clearly stated that the reasonableness of an intrusion is considered in light of the limitations imposed by the common law and in consideration of a balance of a state's interest in the intrusion against the individual's liberty interest.

The common law prohibition on arrests for misdemeanors is compelled by balancing the interests of the state in the arrest against the individual's liberty interest. The State simply has no interest in arresting those who face only a fine and pose no danger to the community. Certiorari should be granted as contrary holdings permit overzealous officers, or officers desiring suspicionless searches, to perform full custodial arrests for the most minor of violations.

II. THE COMMON LAW PROHIBITED TAKING A MISDEMEANANT INTO CUSTODY ABSENT AN ANTICIPATED BREACH OF THE PEACE.

This Court looks first to the common law to determine whether a governmental intrusion satisfies the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit a constable to make an arrest for a misdemeanor unless it was committed in his presence and involved a breach of the peace that was likely to continue. Sir James Stephen, *History of the Criminal Law of England* 193 (1883).

This Court has previously recognized limitations imposed by the common law on the power to arrest. "A peace officer... has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Carroll v. United States*, 267 U.S. 133, 157 (1925).

Misdemeanor arrests at common law were for the purpose of preventing the harm that would flow from a breach of the peace. As Sir James Stephen observed in his commentary on the English criminal law:

> The common law did not authorise the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

Sir James Stephen, *History of the Criminal Law of England*, 193 (1883).

Lord Holt observed in 1710 that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 2 Lord Raymond 1296,1301, 92 Eng. Rep. 349, 352 (K.B. 1710). As one modern commentator has noted, "[t]his is to say that the arrest was not strictly part of the punishment process. It was mostly for the purpose of separating the

combatants and detaining them to prevent further violence." Edward C. Fisher, *Laws of Arrest* 189 (1967).

The offense of driving without a seat belt is not one of violence -- no breach of the peace is intended or occasioned by one who elects to travel the highway less than secure in the event of an accident. Certainly nothing beyond the fact the motorist was once caught without a seat belt suggests that even this minor crime will continue lest she is immediately removed from the roadway. The common law, the starting point in this Court's analysis of the reasonableness of an intrusion, simply did not contemplate an arrest for such a minor, non-violent misdemeanor.

In *Garner*, this Court departed from the common law rule permitting deadly force to seize a fleeing felon. The Court recognized that advances in technology and changes in public opinion as reflected in limitation on officer's use of deadly force compelled a departure. The effectiveness of modern weapons made use of a deadly weapon to apprehend a fleeing felon far more likely to kill than an attempt to seize a suspect with the weapons contemplated at the time of the common law rule. *Garner*, 471 U.S. at 11. The individual interest implicated by permitting the use of deadly force was therefore more compelling than under a regime where the weapons were much more likely to wound, or miss entirely, than kill. Modern limitations on the use of official force further illustrated that all reasonable means of seizing a non-violent fleeing felon at common law were not reasonable in modern times. *Id.* at 16-19.

Modern legislation and technology has made the use of a custodial arrest for a misdemeanor even less compelling than it was at the time it was forbidden by the common law. The Non-Resident Violator Compact has given a state the power to suspend the driver's license of a motorist of another state who fails to appear in court to answer a misdemeanor traffic

charge. *See* Salken, *supra*, at 159. Computer technology permits an officer stopping such a motorist to rapidly learn the status of such motorist's license. Technology and legislation have given states a way of compelling appearance in misdemeanor traffic offenses unknown at common law -- at a time when the common law nonetheless prohibited a custodial arrest for misdemeanors.

Garner further looked to contemporary limitations on police use of force to determine whether deadly force ought to be permitted. Finding the modern trend to prohibit deadly force for non-violent fleeing felons, the Court found reasonableness should be assessed differently than it was under the common law. *Garner*, 471 U.S. at 16-19.

Many states limit the power of officers to arrest citizens for misdemeanor violations. For some time, an arrest for a misdemeanor has typically been permitted by state statute only where releasing the citizen upon a citation would threaten a breach of the peace or jeopardize the prosecution.[2]

Limitations on the power to arrest for misdemeanors not constituting a breach of the peace reveal that modern society finds it unreasonable to vest law enforcement officers with such unlimited discretion. Interestingly, Texas law, by

[2] *See, e.g.* Alaska Stat. § 12.25.180(b) (1984); Cal. Vehicle Code § 40504 (West 1985); Colo. Rev. Stat. § 42-4-1501(4)(a) (1988); Ind. Code Ann. § 9-4-131 (Burns 1987); Ky. Rev. Stat. Ann. § 431.015(2) (Baldwin 1985); La. Rev. Stat. Ann. § 32:391 (West 1988); Md. Trans. Code Ann. § 26-202(a)(2); Mass. Gen. Laws Ann. § ch. 90 § 21 (West Supp. 1988); Minn. Stat. Ann. § 169.91 (West 1986 & Supp. 1989); Neb. Rev. Stat. §§ 29-427, -432, -435, -39-6, 105 (1984-1985); N.M. Stat. Ann. § 66-8-123 (1987); N.D. Cent. Code § 39-07-07 (1987); Okla. Stat. Ann. tit. 22 § 1115.1(A) (West Supp. 1989); Or. Rev. Stat. §§ 133.310(1), 810.410, 811.140 (1987); S.C. Code § 56-25-30 (Law Co-op. Supp. 1988); S.D. Codified Laws Ann. § 32-33-2 (1984); Tenn. Code Ann. § 40-7-118(b)(1) (Supp. 1988); Va. Code Ann. § 46.1-178 (Supp. 1988); Wis. Stat. Ann. §§ 345.22 to .23 (West Supp. 1988); Vt. R. Crim. P. 3(a), (c).

statute, prohibits a custodial arrest for speeding. Tex. Trans. Code Ann. § 543.003 (West 1999). Speeding carries a higher fine under Texas law than the crime for which the petitioner was arrested, failure to wear a seat belt. And while speeding potentially endangers others, failure to wear a seat belt imposes a risk only to those who elect to violate the law.

III. THE MANNER OF A SEIZURE MUST BE REASONABLE IN LIGHT OF THE STATE'S INTERESTS

This case squarely presents the issue of whether probable cause ends the analysis of whether a seizing officer's behavior is reasonable. This Court has previously held that probable cause does not end that inquiry, that while an officer may have the right to seize a citizen, the quality and character of that seizure is still subject to the limitations of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). Probable cause permits a seizure, *Whren v. United States*, 517 U.S. 806, 813 (1996), but the manner in which the seizure is carried out must be reasonable in light of the government's interest in the seizure. *Garner*, 471 U.S. at 8. The lower court decision would permit an officer to seize a citizen in any manner he saw fit so long as the officer had probable cause to believe that some offense -- however petty -- had been committed and the arresting officer did not actually kill or maim the suspect. *Atwater*, 195 F.3d at 245.

A. The State's Interest in Ensuring the Defendant's Presence at Trial and Protecting Society from a Criminal Suspect Does Not Justify a Custodial Arrest for a Fine-Only Misdemeanor.

Once a state has probable cause to believe a citizen guilty of a criminal infraction, the state's interests in seizing her consist of ensuring her presence at trial and ensuring that

the citizenry is safe from her pending trial. *See United States v. Salerno*, 481 U.S. 739, 748 (1987) (recognizing these interest to justify pretrial detention). It has been recognized that the seriousness of the offense is a key indicator of the likelihood of the defendant appearing to answer the charges against her. Fisher, *supra*, at 189. Further, this Court in *Salerno* recognized that the seriousness of the offense was a valid indicator of whether the defendant posed a threat to society if released pending trial. *Salerno*, 481 U.S. at 749. If a goal of punishment is incapacitation, society needs protection from the violent once their dangerous tendencies become evident.

For most modern misdemeanors, pretrial release is all but certain, making the relevant inquiry whether the misdemeanor suggests the defendant presents a danger he will not later present once booked and bonded out. The common law rule prohibiting misdemeanor arrest recognizes the legitimate interests of ensuring the offender's presence at trial and protecting society from the suspect. For ordinary misdemeanors, where the penalty is less than severe, the suspect is not likely to fail to appear as often the sanction for failure to appear exceeds the sanction for the underlying misdemeanor. And, unlike the crimes of extortion and conspiracy to commit murder contemplated in *Salerno*,[3] the commission of a non-violent misdemeanor does not suggest that society needs immediate protection from the suspect.

Where, however, the state illustrates that the misdemeanant, despite the relative minor classification of his crime, does pose an immediate threat to public safety, the common law rule provides for his immediate incarceration. If the constable reasonably believed that the misdemeanant

[3] In *Salerno*, the defendants were charged with 35 acts of racketeering activity including fraud, extortion, gambling, and conspiracy to commit murder. *Salerno*, 481 U.S. at 743.

would cause a breach of the peace if not arrested, then an arrest was permitted.

A modern example of a misdemeanor that itself suggests the necessity of incarceration is driving under the influence where the driver poses a risk to society because of his intoxication, a condition unchanged by his initial seizure. Modern statutes universally recognize an officer's right to arrest a motorist suspected of being intoxicated.[4]

Whren v. United States, 517 U.S. 806 (1996) stands for the rather unremarkable principle that any person who violates the traffic code may be forced to suffer the consequences established by the legislature, a very modest fine. *Whren* did not overrule this Court's holding that the degree of the intrusion occasioned to prosecute the offense must be balanced against the state's interest in that degree of intrusion.

B. Absent a Fear for Public Safety or Inability to Otherwise Bring Offender to Justice, the Means of Seizure May Not Exceed the Punishment Authorized for the Offense.

As this Court recognized in *Garner*, at common law, burglary was a capital crime. *Garner*, 471 U.S. at 13. Imploring deadly force to stop an unarmed burglar therefore involved no greater consequence than the burglar would face if convicted. Modern laws provide much more lenient penalties for burglary and this Court accordingly held in *Garner* that the consequence of death was disproportionate to

[4] *See e.g.* Tenn. Code Ann. § 40-7-118(c)(7) (requiring misdemeanor arrest "the person is so intoxicated that such person could be a danger to such person or to others.")

the state's interest in ensuring prosecuting of a non-capital felon who posed no risk to the community.

Judge Easterbrook has recognized that an arrest for a misdemeanor offense amounts to more punishment than will typically be assigned by a neutral judicial officer. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). A warrantless arrest for such an offense is a decision by a member of the law enforcement community to bring about a s anction exceeding that likely imposed by a neutral and detached judicial officer. When the offense is a fine-only misdemeanor, the law enforcement officer has visited a sanction upon a citizen exceeding even a judicial officer's *authority* to punish.

C. This Court's Decision in *Knowles v. Iowa* Assumes Constitutional Limitations on an Officer's Power to Arrest for a Misdemeanor Traffic Offense.

This Court recently and unanimously held that an officer may not perform a search incident to citation for an ordinary traffic offense -- that is, if an officer does not actually arrest a suspect, a search incident to arrest is unconstitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). This decision assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest.

This Court has held that where police have probable cause to arrest a suspect, it is constitutionally irrelevant whether the search incident to arrest occurs before or after the suspect is actually placed under arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). As Justice Harlan wrote,

> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

Peters v. New York, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

If the traffic offense in *Knowles*, speeding 42 miles per hour in a 25 mile-per-hour zone, had permitted a custodial arrest, then the officer who searched Mr. Knowles would have had probable cause to make an arrest. In *Rawlings* and *Peters*, this Court applied an objective test to determine whether the pre-requisites had been met for a search incident to arrest. The Court looked to whether probable cause existed for an arrest, not whether the officer had actually announced the arrest and placed the suspect in formal custody.

If probable cause to believe a suspect committed the misdemeanor traffic offense of speeding permitted a custodial arrest under the constitution, then it would have been irrelevant whether the officer performed the search incident to arrest before or after the arrest. Probable cause to believe the suspect has committed a crime serious enough to justify a custodial arrest is the only pre-requisite to a search incident to arrest under *Rawlings* and *Peters*.

This Court's unanimous decision in *Knowles* therefore assumes that the constitution does place limitations on an officer's power to arrest for an ordinary misdemeanor traffic offense.

The Court's analysis of the doctrine of search incident to arrest in *Knowles* further demonstrates it assumed that a custodial arrest for an ordinary traffic violation is constitutionally unreasonable. The State of Iowa argued that a search incident to a traffic violation was permitted because the stopped motorist might try to destroy evidence of another crime or destroy evidence relating to his identity. This Court found the possibility that an officer would stumble onto evidence of an unrelated crime to be remote. The Court further found that "[a]s for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles*, 525 U.S. at 118.

The clear inference is that there must be a *basis* for distinguishing between those arrested and those cited. If there were no basis for the distinction then every minor traffic offender would be liable to arrest and the search of Mr. Knowles' vehicle would have violated no legitimate expectation of privacy.

The Court's conclusion that the search of Mr. Knowles' vehicle violated his right to be secure in his person, house, papers, or effects clearly reflects the assumption by this unanimous Court that the state's interest in prosecuting a misdemeanor traffic offense does not justify a custodial arrest.

IV. THE POWER TO ARREST FOR MINOR TRAFFIC OFFENSES GRANTS BROAD AUTHORITY TO SEARCH NEARLY EVERY AUTOMOBILE MERELY BECAUSE IT IS ON THE HIGHWAY

"Very few drivers can traverse any appreciable distance without violating some traffic regulation." B. James George, *Constitutional Limitations on Evidence in Criminal Cases* 65 (1973 ed.) Given the extensive regulation of motor vehicles and their operation, the Fifth Circuits's *en banc* decision means that an officer could select any motorist he desires, place him under arrest for a minor traffic violation, a violation no more serious than those committed by the bulk of all automobiles on the highway, and thereby acquire the right to search the entire car. *See New York v. Belton*, 453 U.S. 454 (1981) (search of cabin of car permitted incident to lawful arrest); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of impounded cars of arrested drivers permitted provided search is consistent with standard inventorying procedures).

Beyond an officer's interest in aggressively engaging in "the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13 (1948), forfeiture laws have created a powerful incentive for officers to inspect as many automobiles as possible for the presence of drugs. Even a relatively small amount of unlawful contraband permits the forfeiture of an automobile carrying the contraband. The effect of this bounty to the state on an individual officer cannot be overstated. The financial existence of many of the drug interdiction units depends on the bounty from forfeiture. Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Agenda*, 65 U. Chi. L. Rev. 35 (1998).

In *United States v. Freeman*, ___ F.3d ___, 2000 FED App. 0102P (6th Cir. March 23, 2000), Judge Clay observed "a troubling pattern or practice by some members of the Shelby County Sheriff's Department drug interdiction squad of stopping 'target' vehicles on questionable probable cause grounds... in order to search for contraband." The Fifth Circuit's opinion in *Atwater* would make such practices even more pervasive as the quantum of suspicion required for the stop would alone justify the search.

The Fifth Circuit's opinion licenses the search of virtually every car on the road where the state's interest consists merely of ensuring the motorist pays a small fine and where institutional pressures encourage the officer to perform a full-scale arrest despite the minimal infraction.

CONCLUSION

The decision of United States Court of Appeals for the Fifth Circuit misconstrued this Court's precedent regarding limitations on the manner of seizure an officer may perform once he has probable cause. The Fifth Circuit's opinion highlights a diversity of approaches taken to the question of an officer's authority to perform a misdemeanor arrest. The federal constitution forbids a misdemeanor arrest for driving without a seat belt in California, but not Texas. Vast degrees of officer discretion to decide whether a fine-only misdemeanor warrants an arrest are permitted in some states, but not others. This Court should grant certiorari to determine whether the citizenry may have their liberty subjected to the discretion of officers with the power to arrest for any offense -- a power they now have in some jurisdictions, but not others.

Respectfully submitted,

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